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No. 85-1654

In The
Supreme Court of the United States
October Term, 1985

LEWIS MYERS,

Petitioner,

vs.

MISSISSIPPI STATE BAR,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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Notwithstanding Petitioner's comments, this case is simply one involving a disciplined attorney, understandably disappointed over the Mississippi Supreme Court's affirmation of discipline imposed upon him by a Complaint Tribunal, who seeks review and redress from this court by raising an alleged case of prosecutorial vindic-

tiveness and lack of notice. This is not a proper case for the issuance of a Writ of Certiorari. Petitioner is simply mounting a last-ditch effort, after years of litigation in the Mississippi Disciplinary System, to get this Court to somehow provide him with further delay from facing the discipline which is now inevitable.

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JURISDICTION

The basis for jurisdiction asserted by Petitioner is improper. There is no basis for jurisdiction for this Petition for Writ of Certiorari under 28 U.S.C. Section 1257. Myers totally fails to assert any special or important reason for this Court's review as required by Supreme Court Rule 17.

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STATEMENT OF THE CASE

Respondent also adopts the statement of facts as set forth in the opinion of the Mississippi Supreme Court. (See appendix to Petitioner's Petition For A Writ of Certiorari).

This action involves the Petitioner's challenge to the discipline imposed upon him for his professional misconduct pursuant to the disciplinary procedures in effect at

the time of his two-year suspension from the practice of law in the State of Mississippi.

On October 23, 1978, a former client of Petitioner, filed a complaint with the Mississippi State Bar against Petitioner and another Mississippi attorney alleging that they failed to timely file an appeal to his convictions for murder and two counts of aggravated assault. An investigation was conducted by Complaints Counsel and his report was submitted to the Committee on Complaints of the Mississippi State Bar on March 6, 1979.

On April 5, 1979, the Complaints Committee considered the complaint filed against the Petitioner and the other Mississippi attorney together with Complaint Counsel's report and decided to issue a public reprimand for failure to file an appeal and properly withdraw as counsel.

On April 10, 1979, the Complaints Committee notified Petitioner and the other Mississippi attorney it was the Committee's opinion that both attorneys failed to take the necessary steps to protect the convicted person's right to an appeal. The committee's notification further stated that the complainant's attempt to discharge them did not relieve them of their responsibility of protecting his rights to an appeal, nor was there any indication either of said attorneys had notified or sought approval from the court of their withdrawal.

The notification further informed both attorneys that the committee as a matter of policy afforded to an attorney to whom the committee determined to administer a public reprimand, the option of requesting that the matter be referred to a Complaint Tribunal to conduct a hearing

where an accused attorney would have the opportunity of confrontation and cross-examination. Both attorneys requested such hearing.

On April 23, 1979, the Complaints Committee directed the Complaints Counsel to file a Formal Complaint against Petitioner. On May 7, 1979, the Petitioner and the other Mississippi attorney filed an objection to the directive and requested that such directive be withdrawn. The committee advised the Petitioner that the referral was in the nature of a *de novo* proceeding and the committee did not possess the authority to restrict the sanctions which the tribunal by law could impose. The sanctions included the power to dismiss the complaint, to issue either a public or private reprimand, and to suspend or disbar the accused attorney.

On May 22, 1979, a Formal Complaint was filed which alleged the following acts of professional misconduct: (1) failure to timely file a motion for a new trial and notice of appeal of the complainant's criminal conviction; (2) failure to take the appropriate action after the convicted person "fired" the attorneys in order to receive permission to withdraw as counsel of record; and (3) if the convicted person did not attempt to fire the Petitioner, then, the Petitioner was charged and is guilty of false swearing, deceit and misrepresentation.

The charges contained in the Formal Complaint filed against the Petitioner were the same charges, in content, that the Complaints Committee previously returned against him. The penalty that could be imposed on the Petitioner, if found guilty of these charges before the Complaints Tribunal, was the same that could be imposed

against him in the Mississippi Supreme Court. Under the Mississippi disciplinary system, there is no categorization of charges, such as, misdemeanors and felonies, nor is there any distinction in discipline to be imposed except that the Complaints Committee could only issue private or public reprimands. If a suspension or disbarment is contemplated, such proceeding had to be presented to the Complaints Tribunal or the Mississippi Supreme Court.

The charges contained in the Formal Complaint were not new but were an elaboration of the charges already filed against the Petitioner. On August 10, 1982, the hearing on the merits of the Formal Complaint took place before the Complaints Tribunal. A decision as to the Petitioner and the other Mississippi attorney was rendered on December 22, 1982, with the Petitioner receiving a two-year suspension from the practice of law in the State of Mississippi and the other Mississippi attorney receiving a private reprimand rather than a public reprimand.

The Tribunal found that Petitioner could not withdraw from the case and terminate his duties to the convicted person merely on the ground that no local court rule required a court order allowing counsel to withdraw. The Tribunal found that the Petitioner failed to take the necessary steps to avoid foreseeable prejudice to the rights of his client including giving the client sufficient notice and time to permit him to employ other counsel to perfect and prosecute his appeal. The Tribunal further characterized Petitioner's actions as an abandonment of the case at a critical stage without reasonable notice to his client and to the court.

From this adverse ruling, the Petitioner appealed to the Mississippi Supreme Court where he asserted eight due process violations, all of which were denied by the court. In disposing of the alleged error of "prosecutorial vindictiveness" the Mississippi Supreme Court held as follows:

> "There is no presumption of vindictiveness in this case because the appellants were tried by a separate and independent court on the identical misconduct charges, and any enhancement of sentence is solely attributable to that court's independent assessment of the suitable penalty. In *Colten v. Kentucky,* 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed. 2d 584(1972), the court refused to apply the presumption of vindictiveness rule where an enhanced sentence was imposed by a different court after a trial *de novo* on the same charge. The record in this case gives further credence to the absence of a retaliatory motive by the committee in recommending suspension or disbarment to the tribunal, if only because of the understanding of the committee at that time that the tribunal's power to hear complaints was limited to those cases warranting suspension or disbarment. Adding weight to the position of the Bar on this issue is the fact that the appellant A (the other Mississippi attorney) actually received a lighter sentence from the Complaints Tribunal than he did before the Complaints Committee."

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RESPONSE TO MYERS' REASONS FOR GRANTING THE WRIT

I.

Myers relies upon *Blackledge v. Perry,* 417 U.S. 21 (1974), as support of his assertion that both the Bar Counsel and the Complaints Committee have acted vindictively in the prosecution of the complaint that has been filed against Petitioner. *Blackledge* stands for the proposition that:

> "A person convicted of an offense is entitled to pursue his statutory right to a trial *de novo* without apprehension that the state will retaliate by substituting a more serious charge from the original one . . . "

The instant case is clearly distinguishable from *Blackledge.* First, the instant proceedings are not criminal in nature and carry no threat of incarceration. Second, no substitution of charges has been made since as the Mississippi Supreme Court stated:

> "There is no presumption of vindictiveness in this case because the appellants were tried by a separate and independent court on the identical misconduct charges, and any enhancement of sentence is solely attributable to that court's independent assessment of the suitable penalty". (App. at 41a).

Third, the potential penalty that could have been imposed upon the Petitioner did not increase for the violations alleged. Fourth, no presumption of vindictiveness is apparent since no evidence has been produced indicating an announced practice of the Complaint Tribunal to impose a heavier penalty upon every attorney found guilty in a trial *de novo* for the explicit purpose of punishing the attorney for his having asked for a hearing *de novo.* Fifth,

there is no appeal involved in the proceedings from the Complaint Committee to the Complaints Tribunal. Sixth, no presumption of vindictiveness exists since the Petitioner chose the forum to consider the complaint filed against him.

This case does not involve any vindictiveness, judicial or prosecutorial. There is no evidence in the record that the Complaints Tribunal was even aware of the Petitioner's decision to seek a *de novo* hearing on the complaint filed against him. Nor is there any indication that the Bar counsel controlled the charges contained in the original complaint. Just the opposite is true, the original complaint was filed by a convicted felon and contained the allegations of misconduct, in terms known to him. Bar counsel formalized the charges in relation to specific disciplinary rules. Moreover, the Mississippi Supreme Court, again at a *de novo* hearing, affirmed the discipline imposed on the Petitioner. Thus, Mississippi had in effect during the pendency of the processing of the complaint filed against the Petitioner, a three-tier system. At each tier the slate was wiped clean and a *de novo* hearing was conducted. Neither the Complaints Tribunal nor the Mississippi Supreme Court was bound by the previous Tribunal's finding. Of course, the Complaints Committee had the first opportunity to pass on the merits of the complaint negating any question of appeal by said committee of another tribunal's action. Therefore, since Myers' has not been deprived of due process predicated upon prosecutorial vindictiveness, his petition for Writ of Certiorari should be denied.

II.

The April 10, 1979, notice to Petitioner from the Complaints Committee informed him of its decision to issue a public reprimand unless he chose to have the complaint referred to a Complaints Tribunal for a full hearing of the charges. The option provision of the notice read as follows:

> "However, the Committee as a matter of policy affords to an attorney to whom the Committee determines to administer a public reprimand the option of requesting that matter come in lieu of such public reprimand be referred to a Complaint Tribunal to conduct a hearing where the accused attorney will have the opportunity of confrontation and cross-examination. The Complaint Tribunal, of course, has inter alia the power to dismiss the complaint, to issue a reprimand, either public or private, or to enter a judgment of suspension or disbarment . . . "

Petitioner asserts that said notice did not apprise him that "the option for a hearing and confrontation meant rescission of the public reprimand, filing formal and additional charges and imposition of more severe punishment of suspension." The notice states the attorney "in lieu of such reprimand" has the option of requesting referral to a Complaints Tribunal for a full hearing on the complaint. According to Black's Law Dictionary, "in lieu" means "instead of", "in place of" or "in substitution of". Consequently, the applicable phrase can also be read "in place of such reprimand", "instead of such reprimand" or "in substitution of such reprimand", all of which clearly advise the reprimand will be rescinded if the option is exercised.

The Mississippi Supreme Court has held that no additional charges were filed against the Petitioner as a result of his choice and the charges were only "formalized" to the degree of referencing them to specific Disciplinary Rules. The content and degree of seriousness were not altered, only the form and style.

The notice also clearly informed the Petitioner that the Complaint Tribunal was empowered to dismiss the complaint, to issue a public or private reprimand and to suspend or disbar any attorney found guilty of the charges levied against him. Any notice advising the Petitioner of the imposition of his suspension prior to the conduction of the hearing before the Complaints Tribunal would clearly have been violative of the Petitioner's right to a full and fair hearing. Alternatively, the notice advised Petitioner that the Complaint Tribunal could: (1) dismiss; (2) issue a reprimand, either public or private; (3) suspend; or, (4) disbar.

Meaningful notice was given to the Petitioner of the proceedings, the charges and the possible outcomes of a hearing before a Complaints Tribunal. Petitioner cannot now complain of the outcome of the election he made to have the complaint heard before a Complaint Tribunal. Myers asserts that if he knew beforehand he faced a two-year suspension, he would never have appealed the decision of the Complaints Committee. As stated, the hearing was not an appeal but a *de novo* hearing. Also, Petitioner cannot now complain about the penalty imposed for if he is able to claim the benefit of hindsight, all accused individuals can claim the same right if they choose to go to trial and suffer more severe civil judgments or criminal

penalties rather than settling their cases prior to trial. Moreover, Myers was not denied his due process rights and his Petition for Writ of Certiorari should be denied.

CONCLUSION

Myers has had his days in court. In fact, Petitioner's case has been reviewed by three separate, distinct and independent tribunals, all of which have found Petitioner guilty of professional misconduct and have made independent assessments of the penalty to be imposed upon Petitioner. It is now time for this litigation to come to an end and for Petitioner to start serving his two year suspension from the practice of law in the State of Mississippi. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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